

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**BOVA FOOD DISTRIBUTORS,
INC.,**

Respondent.

**Docket No. FMCSA-2007-0060¹
(Eastern Service Center)**

ORDER TERMINATING PROCEEDING AND CLOSING DOCKET

On September 7, 2007, the Field Administrator for the Eastern Service Center of the Federal Motor Carrier Safety Administration (FMCSA) (Claimant) issued a Notice of Claim (NOC) charging Respondent Bova Food Distributors, Inc., with one violation of 49 CFR 172.200(a), offering a hazardous material without preparing a shipping paper, with a proposed civil penalty of \$10,000. On December 21, 2007, I ordered that the matter be resolved through binding arbitration.

The proceeding was subsequently assigned to the Honorable Catherine B. Hyatt of the U.S. Civilian Board of Contract Appeals. On June 10, 2009, Claimant submitted a Notification of Settlement to Judge Hyatt and requested that she dismiss the arbitration proceeding. On June 16, 2009, Judge Hyatt granted Claimant's request and returned the matter to FMCSA for action in accordance with the Settlement Agreement.

Under the Settlement Agreement, which was executed on June 9, 2009, and adopted as a Final Order,² Respondent agreed to pay \$8,000 in 10 consecutive monthly installment payments, with \$2,000 of the original civil penalty amount being suspended,

¹ The prior case number was PA-2007-0222-US0508.

² Settlement Agreement, paragraph 8.

conditioned upon Respondent paying the non-suspended portion of the civil penalty in accordance with the terms of the Agreement.

The first three sentences of paragraph 6 of the Settlement Agreement state that:

“Failure to pay in accordance with the terms of this settlement agreement shall be considered a breach of this settlement agreement and will result in the loss of any suspensions in penalties for claims found to be valid, and the reinstatement of the original amount claimed. The original amount claimed (less any payments previously made) will be due immediately. **For example, if any payment is not received by the due date, the payment plan set out above will be void and FMCSA will take steps to immediately collect the entire remaining original amount claimed.**” (Underlining supplied; boldface type in original.) We recently held that similar language in a Settlement Agreement was impermissible because it did not comply with 49 CFR 386.22(a)(1)(vi).³ However, paragraph 15 of the Agreement provides that if any provision of the Agreement is held invalid or illegal, the Agreement shall be construed as if it did not contain the invalid or illegal provision.

Therefore, pursuant to our decision in *Golden Eagle Transit*, Claimant will not be able to seek reinstatement of the suspended amount (\$2,000) of the original civil penalty if Respondent does not satisfactorily comply with the terms of the Agreement.

³ See *In the Matter of Golden Eagle Transit, Inc.*, Docket No. FMCSA-2009-0044, Final Agency Order: Order on Reconsideration, July 10, 2009. The regulation requires the settlement agreement to provide that failure to pay may result in the loss of any reductions in penalties.

Nevertheless, I conclude that the Settlement Agreement is otherwise in the public interest, and, accordingly, it is accepted.⁴

THEREFORE, *It Is Hereby Ordered*, the Settlement Agreement is the Final Order in this matter (except as noted above), the proceeding is dismissed, and the docket is closed.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

11.13.09
Date

⁴ See 49 CFR 386.22.

CERTIFICATE OF SERVICE

This is to certify that on this 19 day of November, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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